Supreme Court, U.S.
FILED
JUL 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 19 ____

NO. _____

GEORGE LOCKETT,
Petitioner

versus

STATE OF ALABAMA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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50 pp

QUESTIONS PRESENTED

I. Whether the search of Petitioner's apartment violated his rights under the Fourth Amendment to the United States Constitution. United States Constitution Amendment IV; *Mincey v. Arizona,* 437 U.S. 385, 57 L.Ed.2d 290, 98 S.Ct. 2408.

II. Whether or not the trial court erred in allowing Petitioner's statement into evidence? In the alternative, whether or not Petitioner's rights to the Fifth and Fourteenth Amendments to the United States Constitution were violated. *Hanyes v. Washington,* 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d. 513; *Mincey v. Arizona,* 437 U.S. 385, 57 L.Ed.2d 290, 98 S.Ct. 2408.

III. Whether or not Petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution were violated when the Honorable Trial Court allowed the substitution of a juror after one juror had been disqualified and after opening statements had already been given. U.S. Constitution Amendment, V, VI, and XIV.

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2. The decision of the Alabama Court of Criminal Appeals affirming the Trial Court and the subsequent denial of Petitioner's Petition for Certiorari is in conflict with prior decisions of the Supreme Court of the United States and the Fifth and Fourteenth Amendments to the United States Constitution concerning the admission of Petitioner's confession.

3. The decision of the Alabama Court of Criminal Appeals affirming the Trial Court and the subsequent denial of Petitioner's Petition for Certiorari is in conflict with Petitioner's constitutional rights under the Fifth Amendment to the United States Constitution with regard

to due process, the Sixth and Fourteenth Amendments to the United States Constitution with regard to a fair trial, and the Fourteenth Amendment to the United States Constitution with regard to equal protection of the laws.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term,
NO.

GEORGE LOCKETT
Petitioner

versus

STATE OF ALABAMA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

The Petitioner, George Lockett, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Alabama entered in this proceeding May 23, 1986.

OPINION BELOW

The judgment and opinion of the Court of Criminal Appeals of Alabama was rendered with opinion on January 28, 1986, affirming Petitioner's conviction in the trial court. (See Appendix B) Application for Rehearing was filed within fourteen days of that date and was overruled by the Alabama Court of Criminal Appeals without opinion on February 25, 1986. A Petition for Writ of Certiorari to the Court of Criminal Appeals was filed with the Alabama Supreme Court within fourteen days of February 25, 1986. The Petition for Writ of Certiorari was denied without opinion on May 23,

1986. The actions of the Alabama appellate courts have not yet been reported in the Southern Reporter or Alabama Reporter as of the date of this petition.

JURISDICTION

The Petition for Writ of Certiorari to the Court of Criminal Appeals of Alabama was denied by the Supreme Court of Alabama on May 23, 1986. The Court of Criminal Appeals of Alabama granted a stay of execution of judgment for sixty days from May 23, 1986, in order for Petitioner to effect a Petition for Writ of Certiorari to the Supreme Court of United States. This Petition for Writ of Certiorari was filed within sixty days of that date. The Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

STATEMENT OF THE CASE

Officer Hollis Lowery of the Huntsville Police Department went to 2830-C Turf Avenue in Huntsville, Alabama, on August 22, 1984. Upon arrival he saw a black male lying face down in the living room with a pistol in his hand.

Detective Ray Tielking with the Huntsville Police Department arrived at the above address between 9:00 and 9:30 P.M. Upon arrival he found a black male lying on the floor and saw several packages containing green-leafy substance. He observed a white powdered substance on an ironing board in the kitchen. He next went to a bedroom and opened a blue velvet bag which contained a large amount of money. He saw a briefcase laying on the couch with green-leafy substance in it. He then proceeded to the kitchen and found a clos-

ed box. He opened the closed box and found scales. He then went to a bedroom and found a pair of pants. He searched the pants and found a billfold in the back pocket. Det. Tielking testified that there was no search warrant obtained.

Detective Paul Ballance testified that he was the evidence officer for the drugs in the present case. The items Inv. Balance collected are as follows: a small red suitcase containing a grey money box with money in the grey money box; a Crown Royal sack found in the bedroom which contained money; a wallet which was removed from pants found in the bedroom (The wallet was opened and drivers license belonging to George Lockett were found.); a purse found in the bedroom was searched and an envelope with green plant material was found; white powder was found on an ironing board in the kitchen; a seat cover box containing a large zip-lock top bag of suspected marijuana was found in the living room; a black briefcase found in the living room was opened and suspected marijuana found; a paper bag with manilla envelopes was found in a cash box; a blue bag that contained a cash box; a paper bag with manilla envelopes found in the hallway; a box containing scales found in the kitchen; mannitol and inositol found in the kitchen cabinets; white powdered substance recovered from the butter dish compartment in the refrigerator.

Homicide detective Harry Renfroe testified that he first saw Petitioner on August 22, 1984, at the Huntsville Hospital Emergency Room. Petitioner was not read his Miranda Warnings at this time. Det. Renfroe testiied as follows concerning Petitioner's statement to him at that time. We quote:

> "A: Basically I asked him what had happened to him. And he responded that he had been shot in a house over off of Norwood, which is located off of University Drive, and I asked him what had happened, and he said that a dude come in to rob them, the gun shot him and he returned the fire and shot the man. And he ended up down at the hospital. I asked him who the man was he shot, if he knew him, and he identified the man as Raymond Jude at that time, that point."

Det. Renfroe questioned Petitioner the next day. He read the Miranda Warnings to Petitioner at this time. Petitioner stated at this interrogation that deceased fired a shot which struck Petitioner and Petitioner returned the fire.

Det. Renfroe stated that he was aware that Petitioner had been shot the night before and that this interview started at 10:08 A.M. and lasted until 12:00 noon.

Homicide detective James Parker went to the Huntsville Hospital Emergency Room at 1:23 A.M. on August 23, 1984. He observed Petitioner in a hospital bed in the emergency room and was aware Petitioner had been shot. At 2:15 A.M. Det. Parker talked with Petitioner after reading him his rights. Petitioner stated that the drugs in the apartment were his and he knew someday he would be caught.

On August 23, 1984, at 11:00 A.M., Det. Parker took a written statement from Petitioner.

Petitioner testified that he lived at 3015 Holmes Avenue in Huntsville, Alabama, and that he was a professional gambler. He stated that his girlfriend lived at 2830-C Turf Avenue. Petitioner denied making a statement claiming the drugs and testified that he was hurting and aching all over when he was interviewed by the detectives. He stated that he had no knowledge of cocaine or marijuana in the apartment.

On cross-examination Petitioner stated that he did not know when he wrote the statement because he was in so much pain and still had a bullet in his back.

At trial, Petitioner was convicted on April 3, 1985, for violation of the Alabama uniform controlled substances act. Petitioner was sentenced to twelve years imprisonment in the State penitentiary. On May 17, 1985, the case was appealed to the Alabama Court of Criminal Appeals which affirmed the conviction on January 28, 1986. Application for Re-hearing was overruled on February 25, 1986. Petitioner submittted a Petition for Writ of Certiorari to the Supreme Court of Alabama and that Petition was denied on May 23, 1986.

REASONS FOR GRANTING THE WRIT

1. The decision of the Alabama Court of Criminal Appeals affirming the trial court and the subsequent denial of Petitioner's Petition for Certiorari is in conflict with prior decisions of the Supreme Court of the United States as the scope of a warrantless search and seizure of a dwelling wherein a homicide had occurred.

Petitioner respectfully maintains the search of the apartment was not constitutionally permissible. See *Mincey v. Arizona,* 437 U.S. 385, 57 L.Ed.2d 290, 98 S.Ct. 2403.

At Petitioner's Motion to Suppress hearing Officer Hollis Lowery testified that on August 22, 1984, at 9:00 o'clock P.M. He went to 2830 Turf Avenue apartment C in Huntsville, Alabama. He was advised there was a black male inside with a gun. Officer Lowery looked inside the apartment and saw a black male face down in the floor. He then entered the apartment, walked up to the black male and removed a .22 caliber pistol from his hand. (ROA p 14-16).

Officer Lowery started checking the apartment to see if anyone else was present and noticed white powder laying on top of the ironing board in the kitchen. In the living room he observed a big clear plastic bag with green, leaf-like substance in a "seat cover" box. He observed little yellow envelopes, "laying all over the place." He also observed money in the floor and a sawed off shotgun on the back door. The person on the floor in his opinion was dead. (ROA pp 16, 17). Officer Lowery observed a "couple of briefcases laying on the couch". He opened them and one briefcase was filled with green leaf-like substance.

Officer D. O. Sharp, a crime scene investigator with the Huntsville Police Department, went to 2830-C Turf Avenue on August 22, 1984. When Officer Sharp arrived at the scene the cabinet, refrigerator and briefcases were closed. (ROA p 53).

Sergeant Ray Tielking a narcotics investigator with

the Huntsville Police Department arrived at the scene at around 9:00 o'clock. He saw the deceased laying in the floor. He saw a box with green leafy substance in it and a black briefcase on the couch with contraband. (ROA p 56, 57). The black briefcase was already opened when he observed it. He next found a blue bag with manilla envelopes full of contraband on the couch. He saw white powder on the ironing board then opened the refrigerator and found more white substance in the door. (In the butter compartment of the refrigerator). (ROA p 63, 64). Sergeant Tielking next found a blue velvet bag in the bedroom. He opened it and found money.

Investigator Paul Ballance found a white powder substance on the ironing board in the kitchen. He next seized the white powder in the refrigerator. (ROA pp 80, 83).

On cross-examination Investigator Ballance stated that he opened a red suitcase, a billfold, the refrigerator, and the black briefcase. (ROA pp 93, 94, 97, 99).

At the conclusion of the State's evidence at the motion to suppress hearing, Petitioner renewed his motion to suppress all the evidence. (ROA pp 149-153, 155).

As Petitioner's trial counsel argues and as this Honorable Court can well see the search of the apartment was well beyond the scope of that permitted by *Mincey v. Arizona,* 437 U.S. 385, 57 L.Ed.2d 290, 98 S.Ct. 2408. The important testimony in this regard is that of Off. Hollis Lowery who testified that he saw a couple of briefcases laying on the couch and opened

them and that one was filled with green leaf-like substance. (ROA pp 18, 22). The testimony of Sgt. Ray Tielking who stated that he opened the refrigerator and found more substance in the door, i.e., the butter compartment of the refrigerator. (ROA pp 63, 64). He further stated that he opened the blue velvet bag which was found in the bedroom which contained $13,242. (ROA p 65). He opened the box which was found in the kitchen that contained scales. (ROA p 69). He opened the blue bag and found envelopes. He also opened one of the manilla envelopes found in the blue bag which contained green leafy substance. (ROA pp 69, 70). As already stated there was no search warrant in this case. (ROA p 103).

The facts in the *Mincey* case (supra) were that an undercover police officer went to an apartment in Tucson, Arizona, with other officers. The undercover officer entered the apartment went to a bedroom and was shot. The officer later died. After the shooting, the narcotics agents looked about quickly for other victims. Within ten minutes homicide detectives arrived at the scene. They secured the scene and proceeded to gather evidence. The detectives opened drawers, closets, cupboards, and emptied clothing pockets. In short, Mincey's apartment was subjected to an exhaustive and intrusive search. No warrant was ever obtained. *Mincey v. Arizona,* 57 L.Ed.2d at 298.

In *Mincey v. Arizona,* 57 L.Ed.2d at 299 this Honorable Court stated:

> "The first contention is that the search of the petitioner's apartment did not invade any constitutionally protected right of privacy. See

Katz v. United States, 389 U.S. 347, 357, 19 L.Ed.2d 576, 88 S.Ct. 507. This argument appears to have two prongs. On the one hand, the state urges that by shooting Officer Headricks, Mincey forfeited any reasonable expectation of privacy in his apartment. We have recently rejected a similar waiver argument in *Michigan v. Tyler,* 436 U.S. 499, 505-506, 56 L.Ed.2d 486, 98 S.Ct. 1942; it suffices here to say that this reasoning would impermissibly convict the suspect even before the evidence against him was gathered. On the other hand, the state contends that the police entry to arrest Mincey was so great an invasion of his privacy that the additional intrusion caused by the search was constitutionally irrelevant. But this claim is hardly tenable in light of the extensive nature of this search. It is one thing to say that one who is legally taken into police custody has a lessened right of privacy in his person. See *United States v. Edwards,* 415 U.S. 800, 808-809, 39 L.Ed.2d 771, 94 S.Ct. 1234; *United States v. Robinson,* 414 U.S. 218, 38 L.Ed.2d 427, 94 S.Ct. 467, 66 Ohio Ops 2d 202. It is quite another to argue that he also had a lessened right of privacy in his entire house. Indeed this very argument was rejected when it was advanced to support the warrantless search of a dwelling where a search occurred as 'incident' to the arrest of its occupant. *Chimel v. California,* 395 U.S. 752, 766 n 12, 23 L.Ed.2d 685, 89 S.Ct. 2034. Thus, this search cannot be justified on the ground that no constitutionally protected right of privacy was invaded.

> The State's second argument in support of its categorical exception to the warrant requirement is that a possible homicide presents an emergency situation demanding immediate action." 57 L.Ed.2d at 299.

To this second contention this Honorable Court stated:

> "But a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation,' *Terry v. Ohio,* 392 U.S., at 25-26, 20 L.Ed.2d 889, 88 S.Ct. 1968, 44 Ohio Ops 2d 383, and it simply cannot be contended that this search was justified by an emergency threatening life or limb. All the persons in Mincey's apartment had been located before the investigating homicide officers arrived there and began their search. And a four day search that included opening dresser drawers and ripping up carpets can hardly be rationalized in terms of the legitimate concerns that justify an emergency search.
>
> Third, the State points to the vital public interest in the prompt investigation of the extremely serious crime of murder." (57 L.Ed.2d at 300).

To this third contention this Honorable Court stated:

> "Moreover, the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. *Coolidge v. New Hampshire,* supra, at 481, 29 L.Ed.2d 564, 91 S.Ct. 2022. The in-

vestigation of crime will always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of minimum simplicity and enforcement of the criminal law. See *United States v. Chadwick,* 433 U.S. 1, 6-11, 53 L.Ed.2d 538, 97 S.Ct. 2476," 57 L.Ed.2d at 301.

And:

"Except for the fact that the offense under investigation was a homicide, there were no exigent circumstances in this case, as, indeed, the Arizona Supreme Court recognized. 115 Arizona, at 482, 566 P.2d at 283. There was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant. Indeed, the police guard at the apartment minimized that possibility. And there is no suggestion that a search warrant could not easily and conveniently have been obtained. We decline to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search.

Finally, the State argues that the 'murder scene exception' is constitutionally permissible because it is narrowly confined by the guidelines set forth in the decision of the Arizona Supreme Court, see supra, at

389-390, 57 L.Ed.2d, at 298." *Mincey v. Arizona,* 57 L.Ed.2d at 301.

To this argument this Honorable Court held:

> "It may well be that the circumstances described by the Arizona Supreme Court would usually be constitutionally sufficient to warrant a search of substantial scope. But the Fourth Amendment requires that this judgment in each case be made in the first instance by a neutral magistrate.
>
> > 'The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement to support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson v. United States,* supra, at 13-14, 92 L.Ed. 436, 68 S.Ct. 367.
>
> In sum, we hold that the 'murder scene exception' created by the Arizona Supreme Court is inconsistent with the Fourth and Fourteenth Amendments— that the warrantless search of Mincey's apartment was not constitutionally permissible simply because a homicide had recently occurred there." See *Mincey v. Arizona,* 57 L.Ed.2d at 302)

In conclusion, Petitioner respectfully maintaiins that the search in the present case went far beyond that allowed in *Mincey v. Arizona* (supra), and respectfully requests this Honorable Court to grant his Petition for Writ of Certiorari.

2. The decision of the Alabama Court of Criminal Appeals affirming the Trial Court and the subsequent denial of Petitioner's petition for Certiorari is in conflict with prior decisions of the Supreme Court of the United States and the Fifth and Fourteenth Amendments to the United States Constitution concerning the admission of Petitioner's confession.

Petitioner's first statement was made to Detective Renfroe while in the emergency room before he had been advised of his constitutional rights. (ROA pp 282, 283). This statement was on August 22, 1984. Petitioner was next interrogated at the Huntsville Hospital emergency room by Detective Parker at 2:20 A.M. on August 23, 1984. This is some four hours after Detective Renfroe first interviewed Petitioner. (ROA p 314). Both Detective Renfroe and Detective Parker knew Petitioner had been shot in the back. (ROA pp 109, 111, 133, 308). Petitioner was then taken to the city jail.

On August 23, 1984, at 10:08 A.M., Detective Renfroe interrogated Petitioner in the criminal investigation division office of the Huntsville Police Department. According to the detectives, the purpose of this interrogation was to try to find a co-defendant, Ellie Moore, yet Petitioner was interrogated again about the incident. (ROA pp 285, 288).

At 11:00 A.M. on August 23, 1984, Petitioner was interrogated by Detective Parker again. (ROA p 318, 319). Detective Parker interrogated Petitioner again on August 23, 1984 at 4:52 P.M. when he checked him out of the city jail and took him to the scene of the incident. (ROA p 323).

Petitioner stated that he was hurting and aching all over when interviewed by the detectives and that he does not know when he wrote the statement because he was in so much pain because the bullet was still in his back. (ROA pp 258, 284).

In *Mincey v. Arizona,* 437 U.S. 385, 57 L.Ed.2d 290, 98 S.Ct. 2408, this Honorable Court held:

> "Statements made by a defendant in circumstances violating the strictures of *Miranda v. Arizona,* supra, are admissible for impeachment if their 'trustworthiness. . . satisfies legal standards.' *Harris v. New York,* supra, at 224, 28 L.Ed.2d 1, 91 S.Ct. 643; *Oregon v. Hass,* supra, at 722, 43 L.Ed.2d 570, 95 S.Ct. 1215. But any criminal trial use against a defendant of his involuntary statement is a denial of due process of law 'even though there is ample evidence aside from the confession to support the conviction.' *Jackson v. Dino,* supra, at 376, 12 L.Ed. 2d 908, 84 S.Ct. 1774, 28 Ohio Ops.2d 177, 1 A.L.R. 3d 1205; *Haynes v. Washington,* 373 U.S. 503, 518, 10 L.Ed.2d 513, 83 S.Ct. 1336; *Lynumn v. Illinois,* 372 U.S. 528 537, 9 L.Ed2d 922, 83 S.Ct. 917; *Stroble v. California,* 343 U.S. 181, 190, 96 L.Ed. 872, 72 S.Ct. 599; See *Chapman v.*

> *California* 386 U.S. 18, 23 and n. 8, 17 L.Ed.2d 705, 87 S.Ct. 824. 24 A.L.R. 3d 1065. If, therefore, Mincey's statement to Detective Hurst was not 'the product of a rational intellect and freewill' *Townsend v. Sain,* 373 U.S. 293, 307, 9 L.Ed.2d 770, 83 S.Ct. 745, quoting *Blackburn v. Alabama,* 361 U.S. 199, 208, 4 L.Ed.2d 242; 80 s.Ct. 274, his conviction cannot stand. In making this critical determination, we are not bound by the Arizona Supreme Court's holding that the statements were voluntary. Instead, this court is under a duty to make an independent evaluation of the record. *Davis v. North Carolina, 384 U.S. 737, 741-742; 16 L.Ed.2d 895; 86 S.Ct. 1761; Haynes v. Washington,* supra, at 515-516, 10 L.Ed.2d 513, 83 S.Ct. 1336." See *Mincey v. Arizona* 57 L.Ed.2d at 303, 304.

Petitioner respectfully maintains that when one considers the totality of the circumstances in this case, the statements should not have been admitted.

> 3. The decision of the Alabama Court of Criminal Appeals affirming the Trial Court and the subsequent denial of Petitioner's Petition for Certiorari is in conflict with Petitioner's constitutional rights under the Fifth Amendment to the United States Constitution with regard to due process, the Sixth and Fourteenth Amendment to the United States Constitution with regard to a fair trial, and the Fourteenth Amendments to the United States Constitution with regard to equal protection of the laws.

After the jury had been struck, opening statements made and Petitioner's motions to suppress were denied, one of the jurors was disqualified because she knew a possible co-defendant. We quote:

> "MS JONES: Okay. A girl that I used to work with at SCI, and I used to work with Ellie Moore, too, when the incident where—she told me—she called me on the phone and told me about Ellie and the situation that went on that night, you know. And she knew people getting busted with cocaine. And I didn't realize that until Ellie Moore's name." (ROA p 156).

It should be pointed out that this statement was made in the presence of the entire jury. (ROA p 158).

After some discussion with the trial Judge, Petitioner made a motion for a mistrial which was denied. (ROA pp 160, 161).

Petitioner respectfully maintains that his constitutional rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution were violated due to the fact that a new juror was picked after opening statements were made and the motion to suppress was denied. After Ms. Jones was released from service, the only possible way to remedy the due process violation would have been to pick another jury from a different panel or continue the case to another term.

Petitioner next maintains that his rights to a fair trial as guaranteed by the Sixth Amendment to the United States Constitution were violated. There is absolutely

no way that the new juror, Mr. Gurley, could have paid as much attention to the opening statement as those jurors already in the juror box. From the transcript it appears that Mr. Gurley was in the audience during the opening statement. Can a defendant at the bar be assured that a person in the audience was paying as much attention to the proceedings as the person in the jury box? The person on the jury would certainly be more attentive since he knows he will ultimately be deciding that issue than would a mere spectator.

As this Honorable Court well knows, the opening statements are crucial in a criminal procecution. We quote:

> "Most of us are aware of the strength of first impressions. They are often very difficult to replace or displace. The impression that a lawyer and his client make upon the jury at the beginning of a trial can last throughout the entire trial and color the verdict. The opening statement by counsel in a criminal case, therefore, is fraught both with grave risk and enormous opportunities. It is the time personally to introduce counsel and client to the jury before its mind is resolved; before it is cluttered with facts and clouded with conflicting testimony. Although there may be times—and they are exceptional—when it may be wise to waive closing argument, it is almost impossible to conceive of a situation where a lawyer would want to pass up this golden opportunity to talk person-to-person with the jury, to inform the jurors of what he expects from them, and to educate them on

> what to expect from his side—and the other side as well." Berstein, Criminal Defense Techniques, Sec. 22.01(2)

And:

> "The opening statement is to a trial what the overture is to an opera; it sets the mood and introduces the theme. Counsel should speak in an ordinary conversational tone but with an unmistakable ring of sincerity and conviction and assurance must be evident to the jury lest the jurors mistake its absence as a sign of doubt of weakness." 5 AmJur Trials pg. 315.

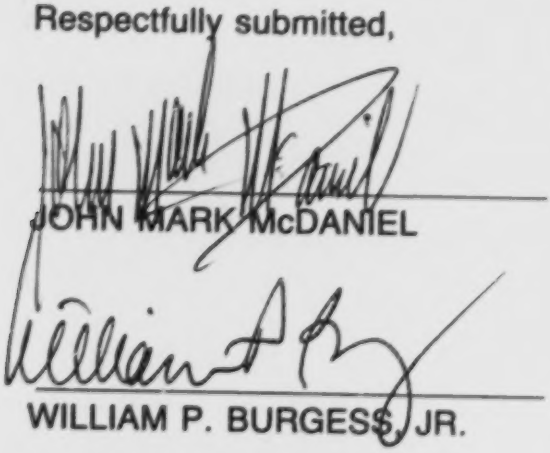
Petitioner respectfully maintains that his constitutional rights under the Sixth Amendment to the United States Constitution with regard to a fair trial were violated by allowing a person who was a spectator during the opening statement serve on the jury.

Petitioner next maintains that his constitutional rights to equal protection as guaranteed under the Fourteenth Amendments to the United States and country have been judged by jurors, who hear a case as jurors not as spectators, from start to finish, Petitioner has a jury of eleven in the jury box for part of the trial and one in the audience for part of the trial. Petitioner respectfully maintains that he has not received equal treatment as compared to other defendants similiary situated.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Alabama.

Respectfully submitted,



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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

AFFIDAVIT OF PROOF OF SERVICE

State of Alabama County of Madison

We, the undersigned, John Mark McDaniel and William P. Burgess, Jr., 313 Franklin Street, Huntsville, Madison County, Alabama 35801, hereby certify that we have deposited for service three (3) copies of a Petition for Writ of Certiorari to the Honorable Charles Graddick, the Attorney General for the State of Alabama, Montgomery, Alabama, and forty (40) printed copies to the Clerk of the Supreme Court of the United States.

This the 8th day of July, 1986.

JOHN MARK McDANIEL

WILLIAM P. BURGESS, JR.

McDANIEL & McDANIEL
313 Franklin Street
Huntsville, Alabama 35801
(205) 534-3018

State of Alabama County of Madison

Subscribed and sworn to before me on this 18th day of July, 1986.

Kim M. Evans
NOTARY PUBLIC

My commission expires the 23rd day of June, 19 90.

APPENDIX A

United States Constitution, Amendment IV

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment V

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when an actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment VI

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed,

which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense."

United States Constitution, Amendment XIV, Section I

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX B

The decision of the Alabama Court of Criminal Appeals in the present case was as follows:

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1985-86

8 Div. 325

George Lockett, alias
v.
State
Appeal from Madison Circuit Court

TYSON, JUDGE

George Lockett was indicted for possession of marijuana and for possession of cocaine. The jury found the appellant guilty of both offenses. He was sentenced to twelve years' imprisonment in the penitentiary.

On the evening of August 22, 1984, Hollis Lowery, a patrol officer with the Huntsville Police Department, received a dispatch on a shooting at 2830C Turf Avenue. When Lowery arrived, a black man ran up to him and said that a black male with a gun was in the apartment.

The glass storm door to the apartment had been broken. The main door was wide open. When Lowery

looked into the apartment, he saw a man lying on the floor with a pistol in his hand. The man was not moving so Lowery entered the apartment.

Lowery went over to the man, removed the gun from his hand and checked for any signs of life. There were none. He then checked the apartment and determined no one else was there. In the process of checking the apartment, Lowery saw a seat cover box in the living room. The top was open and Lowery saw a plastic bag with green plant material in the box. He also observed white powder on a piece of paper on the ironing board. A knife was lying beside the white powder as well as some money. Some money was also next to the man's body.

D.O. Sharp of the Huntsville Police Department took photographs of the scene as well as the evidence collected there.

Ray Tielking, supervisor of the organized crime bureau of the Huntsville Police Department, went to the scene that night. The OCB investigates the vice and narcotics cases in the department.

After the homicide investigation concluded,, he began his investigation of the scene. At some point, he called Officer Paul Ballance to bring him a Scott Reagent Field Test. He also requested Ballance to collect the evidence that was found.

Listed below is the evidence which was collected from the scene.

Kitchen

(1) White powder lying on piece of paper on ironing board

(2) Knife and pipe packing tool found next to white powder on ironing board

(3) Currency on ironing board

(4) Set of scales found in box on counter

(5) One bottle of manitol, one block of manitol, and one bottle of inositol in kitchen cabinet (inositol is a cutting agent for cocaine)

(6) White powder on piece of paper in butter dish of refrigerator

(7) Brown paper bag with 100 empty manilla envelopes found next to water heater

Bedroom

(1) Crown Royal bag with currency inside found on bedside table

(2) Purse found with four manilla envelopes containing green plant material

(3) Suit case with cashbox containing large amount of currency

(4) Wallet found in pair of pants on floor containing the appellant's driver's license, bank account cards and food stamp certificate

Living Room

(1) Seat cover box containing large plastic bag of green plant material found in between sofas

(2) Briefcase found on sofa ccontaining loose green plant material

(3) Briefcase containing small plastic bag of green plant material

(4) Blue plastic bag which contained 30 manilla envelopes of green plant material

(5) Cigarette case containing currency and Ellie Moore's driver's license

(*) Various amount of currency were found throughout the apartment

The majority of the currency found in the apartment was counted by Ballance. It totaled $13,240.

Balance turned over the white powder found on the ironing board and in the refrigerator to Martha Odom of the Department of Forensic Sciences. He also gave Odom the large and small plastic bags of plant material, the 34 manilla envelopes of green plant materials as well as the loose green plant material contained in the briefcase.

Odom analyzed the white powder and determined the substance was cocaine. The total weight of the cocaine was one gram. After examining the green plant material, Odom determined it was marijuana. The total weight of the marijuana was 16.1 ounces or 458 grams.

On the evening of August 22, 1984, Officer Harry Renfroe went to the Huntsville Hospital emergency room on the report of a shooting victim. When he arrived, he learned that the victim was this appellant. At this time, the appellant was not connected to the events at 2830C Turf Avenue. Renfroe asked the appellant what had happened. The appellant said that he had been shot at a house in Norwood. He said a man came to rob "them" and shot him. The appellant then return-

ed fire and shot the man. He said the man's name was Raymond Jude.

Renfroe then called Officer James Parker who was at 2830C Turf Avenue investigating the homicide. He told Parker that the homicide victim might be Raymond Jude. Parker then went to the hospital and talked to the doctor. The appellant was released into police custody that night and transported to the city jail.

When the appellant arrived at the jail, he was advised of his *Miranda* rights and read a waiver of those rights. The appellant indicated he understood those rights, waived them, and wished to talk. (R. 286-288)

The appellant gave his address as 3015 Holmes Avenue but stated he often stayed with his girlfriend, Ellie Moore, who lived at 2830C Turf Avenue. On the night in question, he went over to Moore's around 8:00. Soon after, his sister, Jeannette Lockett, arrived.

At some point, the appellant went to the bathroom. While there, he heard a knock on the front door. Moore let Raymond Jude and Henry Bradley inside while another man stayed at the door. Both men had sacks which he thought had drugs or drug paraphenalia in them. Jude said he needed money. When Moore looked in the bag, Jude pulled out a gun. The appellant then went into the kitchen and got his gun.

As he reached for the gun, Jude shot him in the back. The appealiant turned around and shot Jude and fired again until he fell down. The appellant then ran out the back door and climbed the fence. He then went to a friend's house. This friend, Sarge, took him to the hospital.

When the appellant was asked about the drugs at 2830 Turf Avenue, he stated that they belonged to him and Moore, and he knew that he would get caught someday. He said a man in a black Cadillac would drop

off the drugs.

The next morning, Renfroe got the appellant out of jail. He advised the appellant of his *Miranda* rights and read him the waiver. The appellant said he understood his rights, waived them, and he wanted to talk.

When asked if he could help the police locate Ellie Moore, the appellant said there were a few numbers that he could call, which he did later. Moore had not been located at the time of the trial.

When the appellant was questioned about the events of the previous night, he told Renfroe basically the same story he had told Parker the night before. The appellant also told Renfroe that the drugs in the apartment belonged to him and Moore, and that they sold drugs from the apartment.

At this point, Parker came into the room. The appellant gave a written statement which he wrote out himself.

His statement reads as follows:

> "I arrived at Turf Street at about seven o'clock. Eats and go to the restroom, wash and change pants. Of course, I hear what is going on but can't see don't think I have to see everyone.
>
> "Raymond Jude and Henry Bradley come to the door. Ellie don't know them and I don't myself know the third person standing in the background. They say have you got anything. I said, I am not holding. And they leaves. They come back later about ten minutes and ask for Ellie and did she have any smoke. She call me to the door with her and Raymond con his way in, and the others say they don't have to come in. Now, Raymond is in and trying to cope a nickel. Henry is standing at the door, one foot in, one out looking with his hand in

> his pocket. Me and my sister is walking toward the stove as we smell trouble. I put my gun in my back. Jeannette is still holding the baby. Raymond ask Ellie for money. She refused to give. Jude pull his gun on Ellie and I go for my piece. I am hit in side and he takes two bullets, maybe more. He fall hurt and I am still standing. Henry runs, Ellie scream, my sister holler and run. I go, too." (R 318-19)

Sheila Patton testified that she is employed at SCI in Madison County Alabama. In August of 1984, Ellie Moore worked in her department at SCI. Moore continued working at SCI until January of 1985. During that time, Patton knew there were warrants out for Moore's arrest, but she never contacted the police. Patton heard Moore talk about the appellant when they worked together. She din't know where Moore was at the time of trial.

Catherine Acklin, the manager of the Norwood project for the Hunsville Housing Authority, testified that the apartment at 2830C Turf Avenue was rented to Moore on November 22, 1983. Moore lived there with her two children. The apartment was declared vacant on September 12, 1984, and the lease was terminated.

The appellant stated that in August of 1984, he lived with his mother at 3015 Holmes Avenue. Ellie Moore was his girlfriend, and she lived at 2830C Turf Avenue. The appellant stated he would visit Moore at times but never stayed there.

When the appellant would accumulate money, he would take it to Moore for her to keep because he did not trust banks. However, he and Moore did have a joint bank account.

Of the money found at the apartment that night, the appellant said $11,000 or $12,000 of it belonged to him. He testified that he was a professional gambler by oc-

cupation and that most of the money came from his gambling winnings. The appellant testified that he received $9,200 from the sale of his house in July of 1982. He also received a $9,225 insurance check following the death of his wife in 1982. Further he received $1,677 on a judgment.

The appellant denied any knowledge of the cocaine and marijuana found in the apartment. He also denied telling the police that the drugs belongs to him and Moore. He said he never told the police anything about knowing he would get caught, or about a man in a black Cadillac.

He said he was hurting during the statements he gave to the police and asked for a doctor.

The appellant said he had seen Ellie Moore since August of 1984. He did not know where she was but knew she was in town.

I

The appellant contends that the warrantless search of the premises at 2830C Turf Avenue was unreasonable and illegal, and, therefore, his motion to suppress was due to be granted.

"A person can claim the protection of the Fourth Amendment only if he can show some legitimate expectation in the area or object searched." *United States v. Long,* 674 F.2d 848, 852 (11th Cir. 1982). (Footnote omitted.) "Only those persons whose privacy is invaded by a search have standing to object..." to that search. *United States v. Colbert,* 474 F.2d 174, 176 (5th Cir. 1973).

Clearly, the appellant did not have a legitimate expectation of privacy in the apartment. The apartment

was rented by Ellie Moore, who lived there with her two children. Although the appellant visited the apartment frequently, he did not reside there. The appellant was not present when the search of the apartment was conducted. Therefore, the appellant has no standing to object to its search. See *Plyes v. State,* 448 So. 2d 416 (Ala. Cr. App. 1983), appeal after remand, 448 So. 2d 421 (Ala. Cr. App. 1984).

Furthermore, the appellant had no standing to object to the search and seizure of the marijuana and cocaine found in the apartment. The appellant voluntarily abandoned the evidence in question when he fled the scene. Therefore, he had no legitimate expectation of privacy as to the evidence seized when the search was conducted. See *Colbert,* supra.

For the reasons stated above, the appellant's motion to suppress was properly denied.

II

The appellant objects to the admission into evidence of all of his statements made to police officers.

The appellant's statements to Officer Renfroe in the emergency room were not in violation of *Miranda v. Arizona,* 348 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The appellant, at this time, was not the subject of custodial interrogation. He was merely being questioned by Renfroe as a victim of a gunshot wound. Therefore, this statement was properly admitted into evidence.

The other three statements were also properly admitted into evidence. Each of the statements was made after the appellant had been advised of his *Miranda* rights and had been read a waiver of those rights". Each time, the appellant indicated he understood those

rights, waived them, and wished to make a statement. The officers testified that no threats, promises, hopes of reward or other inducements were made or offered in order to obtain the appellant's statement. Further, the appellant did not appear to be under the influence of any drugs or alcohol when he made his statements. Certainly the State presented sufficient evidence to overcome the presumption that the statements were involuntarily given.

The only evidence which the appellant gives in support of his claim of involuntariness is that he had recently been the victim of a gunshot wound and was in a lot of pain when he made his statements.

This evidence was refuted by the officers. Although the appellant told one of the officers that he was a little sore, he did not appear to be in pain, and did not ask for medical help at the time of giving the statements.

After our review of the evidence, we conclude that the trial judge properly determined that the appellant's statements were voluntarily made. There is no error here. *Shewey v. State,* 48 Ala. App. 730, 267 So. 2d 520 (1972); *Bills v. State,* 49 Ala. App. 726, 275 So. 2d 706 (1973), and authorities cited therein.

III

The appellant claims that the State failed to prove the corpus delicti independent of the appellant's confession.

> "It is a settled principle of law that a mere extrajudicial confession, uncorroborated by other facts, is insufficient to show the corpus delicti and cannot support a conviction. *Matthews v. State,* 55 Ala. 187, 28 Am.Rep. 698

(1876); *Reynolds v. State,* Ala. Cr. app., 346 So. 2d 979, cert. Denied, Ala., 346 So. 2d 986 (1977). However, it is equally as settled that inconclusive facts and circumstances tending prima facie to show the corpus delicti may be aided by the admission or confession of the accused so as to satisfy the jury beyond a reasonable doubt, and so to support a conviction, although such facts and circumstances, standing alone, would not thus satisfy the jury of the existance of the corpus delicti. *Hill v. State,* 207 Ala. 444, 93 So. 460 (1922); *Bryant v. State,* 33 Ala. App. 346, 33 So. 2d 402 (1948).

"Circumstantial evidence may afford satisfactory proof of the corpus delicti. The presentation of facts, from which the jury may reasonably infer that the crime charged was committed, requires the submission of such question to the jury. *Johnson v. State,* 247 Ala. 271, 24 So. 2d 17 (1946); *Taylor v. State,* 276 Ala. 232, 160 So. 2d 641 (1964). Reasonable inferences may furnish a basis for proof beyond a reasonable doubt. *Royals v. State,* 36 Ala. App. 11, 56 So. 2d 363, cert. denied, 256 Ala. 390, 56 So. 2d 368 (1952)."

Watters v. State, 369 So. 2d 1262, 1271-72 (Ala. Cr. App. 1978), reversed on other grounds, 369 So. 2d 1272 (Ala. 1979). See also *Hadley v. State,* 448 So. 2d 465 (Ala. Cr. App. 1984).

We find that the State did present evidence which tended to prove the corpus delicti. The officers searched the apartment and found various quantities of marijuana and cocaine throughout the apartment. Some of the contraband was exposed outright in view of anyone entering the premises. The appellant's wallet, with his identification, was found in a pair of pants in

one of the bedrooms. This evidence, viewed in light of the appellant's confession, was sufficient proof of the corpus delicti. See *Mills v. State,* 41 Ala. App. 206, 126 So. 2d 499 (1961) (a similar fact situation wherein the appellant was convicted for unlawful possession of prohibited liquors).

There is no basis of error on this issue.

IV

The appellant challenges the sufficiency of the evidence on the ground that the State did not prove his possession or ownership of the marijuana and cocaine. We do not agree.

The appellant's wallet was found in the apartment where the marijuana and cocaine were located. He told the officers that the drugs belonged to him and Ellie Moore. This evidence was sufficient to establish the appellant's ownership of the drugs. *Mills,* supra.

Therefore, we conclude that there was evidence presented at trial from which the jury could conclude, by fair inference, that the appellant was guilty of the offenses charged beyond a reasonable doubt. *Cumbo v. State,* 368 So. 2d 871 (Ala. Cr. App. 1979), and authorities cited therein.

V

The following portion of the transcript took place after the opening statements in this case but prior to the presentation of any evidence.

> "THE COURT: Let's see, now, who was it wondering about lunch? Well, it's not long, but we will go a little while. Let's see, now, Lisa Jones. You told me yesterday when we first

recessed that some person that works with you had mentioned the name Ellie Moore or something in connection with this case. Now, you were not asked anything about any acquaintance that would invoke a response from you concerning what you told me, but I thought maybe I would give the parties here an opportunity to pursue the matter, since we have not yet started with the case or the evidence in the case, to make sure that your knowledge or what you do know would not have any bearing on your ability to sit impartially as a juror in this case. So, I think the parties would have that right to do that. So, would you just state now what it is that you told me. I have forgotten myself.

"MS JONES: Okay. A girl that I used to work with at SCI, and I used to work with Ellie Moore, too, when the incident where—she told me—she called me on the phone and told me about Ellie and the situation that went on that night, you know. And she knew people getting busted with cocaine. And I didn't realize that until Ellie Moore's name.

" THE COURT: Because there was no mention in the selection process. That is true. Now, do you think what you have been told would influence you in your ability to render a fair and true verdict in the case?

"MS. JONES: It might. I might not be able to.

"THE COURT: Well, we have already selected you now, see, that's the problem.

"MS. JONES: That's the problem.

"THE COURT: Okay. Well, let me ask you to go back into the juryroom and let me consider this matter, and I will come back to it. Okay. So, please, go back into the juryroom. You haven't talked to any of the other jurors about your knowledge, have you?

"MS. JONES: No, sir.

"THE COURT: Do not say anything to them.

"(Whereupon, the jury was sent to the juryroom at 11:38 A.M., at which time, the following occurred out ot the presence and hearing of the jury:)

"MR. GRIFFIN: Your Honor, I feel—if I may address the bench on it, I feel—

"THE COURT: Well, I think this: I think we possibly ought to consider something at this point. Since none of the evidence has been presented, I think we could dismiss that juror and qualify another one. We have got other jurors available. And seat another juror in place of that juror.

"MR. GRIFFIN: Judge, in view of her statement in front of the whole jury I would object to that, I wouldn't have any objection to qualifying entirely another new jury, but I am not—I am concerned about how we go about picking another juror.

"THE COURT: Well, she did not—

"MR. GRIFFIN: One single juror.

"THE COURT: She made no indication about it one way or the other.

"MR. GRIFFIN: I mean, her statement, though.

"THE COURT: Well, I would have to ask—

"MR. GRIFFIN: That was made in front of the jury.

"MR. WEBSTER: That was in their opening statement, the jury heard that.

"THE COURT: Sure. But I would be glad to ask the other jurors—first of all, I will be glad to dismiss that juror and we can proceed with eleven by agreement, or we can seat another one or qualify and seat another one, and obviously in the process I would inquire of the remaining eleven whether or not they are influenced by the statement that she made here in open court. And as Mr. Webster said, she has said nothing more really than what has been told to them in the opening statements, but I would be happy to hear from you gentlemen on how you would prefer to proceed.

"MR. WEBSTER: I will go with eleven, Judge, but the defendant is the one who is going to have to make the choice.

"THE COURT: Sure.

"MR. WEBSTER: Because if I object it's not going to make a lot of difference. Or I will qualify another juror, whichever you want to do.

"THE COURT: We are not going to go with eleven unless both of you agree with it, and we will seat another one if you want me to. I

am not asking you for an agreement, I am just asking you for your thoughts on it, and let me know how you want to proceed, and it will be all right with the court.

"MR. GRIFFIN: Well, Judge, I feel that first, I would have to do this: Based on, as I say, her apparently innocently gathered personal knowledge that she has epxressed before the jury, I would feel it my duty to make a motion at this time for a mistrial on the case. And if the motion for a mistrial is overruled by the court, I think we can agree on some procedure to go ahead, but I feel that it coming on at this point, that I would have to make the motion.

"THE COURT: Well, in view of—with nothing more, I am going to deny your motion for a mistrial. I will further inquire of the total—of the jury, but at this point I would deny it. We have got several options that we can take. We may still have those jurors available from the panel that have already been qualified, and it would be possible just to back up and call for that last one, dismiss one and take—put the one that was last—the last strike back on.

"MR. GRIFFIN: May I have just a minute to talk with my client about this?

"THE COURT: Sure.

"MR. GRIFFIN: And Reid, too.

"THE COURT: Go ahead. I do think that you are probably entitled—that that juror ought not to sit.

"MR. WEBSTER: I think she feels that way, Judge.

"THE COURT: I think she does, too. Now, she told the court when this was mentioned that it would not—would make no difference one way or another but I think this morning and overnight she has decided that she would prefer not to sit.

"(Whereupon, proceedings were in recess at 11:40 A.M., until 11:45 A.M., at which time, the following occurred out of the presence and hearing of the jury:)

"MR. GRIFIFN: Your Honor, predicated only on the fact that it appears the court overruling a mistrial on the matter, I am willing to—we discussed this briefly, it can be done, to replace the juror with someone else if someone else is available off the list.

". . . . . .

"THE COURT: and 34 is acceptable to you?

"MR. GRIFFIN: yes, sir.

"THE COURT: 34 is acceptable to you, right?

"MR. WEBSTER: I say yes, Judge.

"THE COURT: Well, I am not imposing my views on either one of you.

"MR. WEBSTER: Okay.

"THE COURT: I am not twisting your arm or indicating that you ought to, because we have got several alternatives.

"MR. WEBSTER: I prefer this alternative,

because we have already qualified them, and I have had a chance to talk to them and he has.

"THE COURT: Plus, anybody that was struck from the panel, not only has gone through the qualifying—

"MR. WEBSTER: But they have heard the opening statements.

"THE COURT: But have also heard the opening arguments." (R. 156-64)

The appellant now contends that his motion for a mistrial should have been granted.

"A mistrial should not be granted unless there is a manifest necessity to discharge the jury or unless the ends of justice would otherwise be defeated. *Hallman v. State,* 36 Ala. App. 592, 61 So. 2d 857 (1952); *Crouch v. State,* 53 Ala. App. 261, 299 So. 2d 305, *cert. denied,* 292 Ala. 718, 299 So. 2d 312 (1974); *Diamond v. State,* 363 So. 2d 109 (Ala. Cr. App. 1978); *Woods v. State,* 367 So. 2d 982 (Ala. 1978).

"A trial judge is allowed broad discretion in deciding whether under the law a ground for a mistrial exists. *Brewer v. State,* 24 Ala. App. 410, 137 So. 454 (1931); *Hallman,* supra; *Ballard v. State,* 51 Ala. App. 393, 286 So. 2d 68, *cert. denied,* 291 Ala. 772, 286 So. 2d 71 (1973); *Woods,* supra.

"The presence of the trial judge at the scene places him in the best position to determine what effect, if any, some event may have upon the ability of the jury to render a just and

> true verdict in the case, and his decision in this matter will not be reversed except for a clear abuse of discretion. *Franks v. State,* 45 Ala. App. 88, 224 So. 2d 924 (1968); *Shadle v. State,* 280 Ala. 379, 1984 So. 2d 538 (1967); *Woods,* supra."

Rocker v. State, 443 So. 2d 1316, 1319 (Ala. Cr. app. 1983), cert. denied, 443 So. 2d 1316 (Ala. 1984).

In *Rocker,* supra, one of the jurors received an unauthorized communication after the first day of the trial. The trial judge disqualified the juror and excused her from the jury. He then replaced her with an alternate juror. The trial judge found no cause to declare a mistrial and discharge the jury. This court affirmed the trial judge's decision.

We conclude that a mistrial was unnecessary in the case at bar. The juror who replaced juror Jones (by agreement of both parties) was present in the courtroom during the opening statements. He was included in the jury prior to the presentation of any evidence to jury.

Therefore, we find that the trial judge did not abuse his discretion by denying the appellant's motion for a mistrial.

VI

The appellant claimed ownership of a large portion of the money found in the apartment in question. He attempted to introduce several documents as evidence to show reason that he had so much money. The trial judge refused to admit the documents into evidence. The appellant contends this was error. We disagree.

First of all, the appellant testified that most of the money came from gambling. Secondly, these

documents were dated 1982, and the money was found in the apartment in 1984. We would be hard pressed to find that the money received by the appellant in 1982, as evidenced by these documents, is the same money that was found in the apartment in 1984. These documents were "so remote as to time or circumstances that [their] relevance or materiality must rest in conjecture and speculation." *Robertson v. State,* 339 So.2d 100, 104 (Ala.Cr.App.), cert. denied, 339 So.2d 104 (Ala. 1976); *White v. State,* 380 So.2d 348 (Ala.Cr.App. 1980).

Lastly, even had we found these documents to be admissible into evidence, any error which resulted from their exclusion was harmless. The appellant was allowed to testify as to the amount of money contained in these documents. Therefore, he was not prejudiced by their exclusion from evidence. Rule 45. A.R.A.P.

This record is free of error. The judgement of the trial court is due to be and is, hereby, affirmed.

AFFIRMED.

All the Judges concur.

APPENDIX C

The decision of the Alabama Supreme Court was as follows:

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

May 23, 1986

85-620

EX PARTE: GEORGE LOCKETT

PETITION FOR WRIT OF CERTIORARI

(Re: George Lockett, alias v. State)

CCA 8/325

CERTIFICATE OF JUDGMENT
WRIT DENIED

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari be denied.

MADDOX, J.-TORBERT, CJ., ALMON, SHORES & BEATTY, JJ., CONCUR.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this ____ day of _____

Clerk, Supreme Court of Alabama